Case Nos. 18-2012, 18-2225, 18-2249, 18-2253, 18-2281, 18-2332, 18-2416, 18-2417, 18-2418, 18-2419, 18-2422, 18-2650, 18-2651, and 18-2661

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re: National Football Players' Concussion Injury Litigation

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Hon. Anita B. Brody, No. 2:14-md-02323-AB and MDL No. 2323)

OPENING BRIEF OF APPELLANTS, MELVIN ALDRIDGE, ET AL[1] AND JOINT BRIEF ADDRESSING 5% HOLDBACK AND IRPA FEE CAP

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[1] Appellants include Melvin Aldridge, Patrise Alexander, Charlie Anderson, Charles E. Arbuckle, Cassandra Bailey, Individually and as the Representative of the Estate of Johnny Bailey, Rod Bernstine, Reatha Brown, Individually and as the Representative of the Estate of Aaron Brown, Jr., Curtis Ceasar, Jr., Larry Centers, Trevor Cobb, Darrell Colbert, Elbert Crawford III, Christopher Crooms, Gary Cutsinger, Jerry W. Davis, Tim Denton, Leland C. Douglas, Jr., Michael Dumas, Corris Ervin, Robert Evans, Doak Field, James Francis, Baldwin Malcolm Frank, Derrick Frazier, Murray Garrett, Clyde P. Glosson, Anthony Guillory, Roderick W. Harris, Wilmer K. Hicks, Jr., Patrick Jackson, Fulton Johnson, Richard Johnson, Gary Jones, Eric Kelly, Patsy Lewis, Individually and as the Representative of the Estate of Mark Lewis, Ryan McCoy, Emanuel McNeil, Gerald McNeil, Jerry James Moses, Jr., Anthony E. Newsom, Winslow Oliver, John Owens, Robert Pollard, Derrick Pope, Jimmy Robinson, Glenell Sanders, Thomas Sanders, Todd Scott, Nilo Silvan, Matthew Sinclair, Dwight A. Scales, Richard A. Siler, Frankie Smith, Eric J. Swann, Anthony Toney, Herbert E. Williams, James Williams, Jr., Butch Woolfolk, Keith Woodside, Milton Wynn, James A. Young, Sr., and their counsel, Lubel Voyles LLP, Washington & Associates PLLC, and The Canady Law Firm.

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STATEMENT OF JURISDICTION

The district court had original jurisdiction over this matter pursuant to 28 U.S.C. §§ 1332(d). The issues addressed in this brief arise from appeals taken from the District Court's (a) order awarding the full amount of common benefit fees (JA 8766-85); (b) order holding back 5% of each class members' monetary award (JA 115-16); (c) order imposing a percentage cap on private attorneys' fees (JA 113-14); and (d) order allocating zero common benefit fee to the Aldridge Objectors' counsel (JA 8971-97). Those rulings constitute final collateral orders subject to immediate appeal over which this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because the orders conclusively resolve the disputes and legal issues presented. *See In re National Football League Players Concussion Injury Litigation*, 923 F.3d 96, 106-07 (3d Cir. 2019); *see also Interfaith Community Organization v. Honeywell Intern., Inc.*, 426 F.3d 694, 702–703 (3d Cir. 2005). The Aldridge Objectors[1] timely appealed each order. (JA 1-2; 6-7; 38)

[1] Appellants, the Aldridge Objectors, include a number of Settlement Class Members who have been interchangeably referred to as the Alexander Objectors or the Aldridge Objectors owing to two of the members Melvin Aldridge and Patrise Alexander. (JA6; JA7931).

STATEMENT OF ISSUES

The Aldridge Objectors Issues:

- Did the district court abuse its discretion and violate due process for failure to use a transparent, proper process when it granted Co-Lead Class Counsel's Petition for $112.5 million in attorneys' fees?
- Did the district court abuse its discretion, employ a legally erroneous standard, and rely on clearly erroneous factual findings when it approved Mr. Seeger's proposal to reject common benefit award and allocate to Lance Lubel zero common benefit funds?

The Consolidated Issues:

- Did the district court abuse its discretion when it ordered a 5% holdback from each class member's monetary award to fund future fees?
- Did the district court abuse its discretion when it limited private counsel fees to 22%?

STATEMENT OF RELATED CASES

This Court initially rejected, as unappealable, the district court's preliminary approval of a proposed class settlement and subclass. The Court's decision was filed on December 24, 2014 and reported at 775 F.3d 570. This Court then affirmed the order certifying the class and approving the class settlement in this action. The Court's decision was filed on April 18, 2016, as amended May 2, 2016, and reported

at 821 F.3d 410. Recently, the Court reversed in part and affirmed in part the District Court's order that the anti-assignment provision of the class settlement agreement forbade assignment of settlement proceeds. The Court's decision was filed on April 26, 2019 and is reported at 923 F.3d 96. The Aldridge Objectors have also appealed the District Court's order granting the Class Counsel's First Post-Effective Date Fee Petition, (JA45) docketed as No. 19-2085 in this Court.

STATEMENT OF THE CASE

This consolidated appeal arises from rulings by the district court administering Article XXI, the Attorneys' Fees provisions, of the Settlement Agreement that this Court approved in May 2016. *In re National Football League Players Concussion Injury Litigation*, 821 F.3d 410 (3d Cir.), cert. denied sub nom. *Gilchrist v. Nat'l Football League*, 137 S. Ct. 591 (2016), and cert. denied sub nom. *Armstrong v. Nat'l Football League*, 137 S. Ct. 607 (2016).

This brief addresses the award of $112.5 million in common-benefit fees and the district court's abdication of any transparent fee process. This brief further addresses the district court's decision to hold back 5% of each Class Members' recovery for future fees; the district court's *sua sponte* decision to cap private counsel's fees; and the district court's decision that common benefit fees were unavailable for the Aldridge Objectors' counsel, Lance Lubel, because of his status as objector.

In May 2016, this Court affirmed the district court's order granting a motion for class certification and final approval of a settlement between Former NFL Players and the National Football League. As part of the decision, the Court approved severance of the "fairness of the settlement" from any question of attorneys' fees under Article XXI of the Settlement. (JA 5933-34) 821 F.3d at 445.

In January 2017 the Settlement Agreement became final. Article XXI of that Settlement Agreement speaks to fees in the following key provisions:

- The NFL Parties will pay, or cause to be paid, a total of One Hundred and Twelve Million, Five Hundred Thousand United States dollars (U.S. $112,500,000) into the Attorneys' Fees Qualified Settlement Fund (hereinafter, the Fee Fund," as set forth in Section 23.7, to be held in escrow until such payment shall be made as directed by the Court. The NFL Parties shall pay class attorneys' fees and reasonable costs.

- After the Effective Date, Co-Lead Class Counsel may petition the Court to set aside *up to* five percent (5%) of each Monetary Award and Derivative Claimant Award to facilitate the Settlement program and related efforts of Class Counsel.

Referencing these provisions, this Court observed: "From this, class members knew from where the fees for class counsel were coming (a separate fund), what the NFL's position on fees would be (no objection up to $112.5 million), and could ballpark the size of class counsel's eventual fee request (a betting person would say it will be close to $112.5 million)." *Id* at 446.

Though the Settlement Agreement reserves to the District Court the management of fee petitions, the District Court had, in 2012, already established the standards and criteria for such attorneys' fees and reasonable costs. (JA 948-59).

The first fee petition came to the District Court from the Faneca Objectors on January 11, 2017, without order or invitation. (JA 6280-82). Co-Lead Class Counsel responded, describing the Faneca fee petition as premature and designed to "frustrate the interests of judicial efficiency and economy." (ECF 7106). Nineteen days later, Co-Lead Class Counsel filed a Petition for an Award of Attorneys' Fees, Reimbursement of Costs and Expenses, Adoption of a Set-Aside of Five Percent of Each Monetary Award and Derivative Claimant Award, and Case Contribution Awards to Class Representatives seeking a percent of 65 years of projected class members' recovery and the maximum 5% holdback from class members to pay future fees. (JA 6555-57).

For context, these fee petitions pre-dated not just the first *payment* of a single class claim; they predated the close of class registration and the opening of the claims process. The Aldridge Objectors urged that all fee petitions pre-dating payment to any former NFL Players or an established track record for payment of claims were premature. (JA7085). The Aldridge Objectors requested a case management order to aid all counsel in a reasoned presentation of fee petition vis-à-vis class members' recovery. (ECF 7176, Motion for Entry of Case Management Order Governing

Applications for Attorneys' Fees; Cost Reimbursements; and Future Fee Set-Aside, filed February 21, 2017). The District Court denied the motion over a year later, after making the fee award. (JA8912).

The Court appointed Professor William B. Rubenstein of Harvard Law School as an expert witness to advise the Court on two issues: (1) caps on the attorneys' fees of individually retained plaintiffs' attorneys ("IRPAs") and (2) Class Counsel's 5% holdback request. (JA 7924) Professor Rubenstein rendered the opinions that:

> (a) the Court should not impose a 5% tax, as $112.5 million should be sufficient, if invested, to pay attorneys' fees for the duration of the 65-year settlement; and
>
> (b) The Court should presumptively cap private fee contracts to ensure that the Former NFL Players do not pay more than approximately 33% in total attorneys' fees.

(JA 8282).

The Court then, in a series of orders beginning April, 2018, granted the Petition for Fees; ordered the immediate distribution of common-benefit fees to pay Class Counsel *for securing the Settlement Agreement*; ordered a 5% holdback on Class Members' MAF recoveries to create a new fund for future common-benefit fees—those incurred to *implement* the settlement; and capped private fee contracts.

As to the awarded fees, the Court ordered Co-Lead Class Counsel Seeger to submit a proposal for the allocation of such fees among Class Counsel. (JA 7920). Mr. Seeger submitted a proposal on October 10, 2017. (JA 7943). Mr. Seeger proposed that his firm be allocated over 60% of the funds available and the objectors,

such as Appellant Lance Lubel, suffer a negative multiplier for opposing the settlement. (*e.g.* JA 7358, characterizing objections as efforts to "torpedo" the settlement). The District Court allocated largely as proposed.

Shortly thereafter, the Court granted Class Counsel's First Post-Effective Date Petition for Fees and Costs (covering 1.7.17 to 3.24.18) in the amount of $7,525,307.73 in fees and $745,041.28 in expenses. (JA 118-26). Class Counsel's Second Post-Effective Date Petition for Fees and Costs (covering 5.25.18 to 11.30.18) in the amount of $2,895,044.17 in fees and $300,590.26 in costs and its July 25, 2019 Third Post-Effective Data Petition for Fees and Costs (covering 12.1.2018 to 5.31.19) in the amount of $1,445,488.66 in fees and $243,788.10 in expenses remain pending. (JA 9383-9401, 9428-9444). The Court then vacated appointments of **all** Class Counsel and reappointed **solely** Christopher A. Seeger as Class Counsel. (JA 9402-03).

SUMMARY OF THE ARGUMENT

Fee fights in class action litigation are, sadly, not rare. It is rare, however, for the optics of a common-benefit fee award to be so poor that even Class Counsel are divided on every aspect of that award, not just allocation of the money. A percent-of-recovery fee implies success, yet even some Class Counsel question whether, owing to crises in implementation, the Settlement Agreement can be characterized as a success. (JA9786, Motion of Class Counsel the Locks Law Firm for

Appointment of Administrative Class Counsel, urging that "The Settlement Agreement is in danger of failing in its execution")

First, the timing of the attorneys' fee award, calculated as a percent of a speculative 65-year recovery is facially unfair. It would look different if the District Court paid the lawyers a lodestar fee now and a percentage later. But, to pay the lawyers a percentage of, say, Class Member Jones' projected recovery 10 or 30 or 50 years before Class Member Jones gets that recovery (if he gets it at all), looks unfair. The Court's appointed expert counseled against it. (JA 8282). The Court's appointed expert urged the Court to preserve and invest the Fee Fund. *Id*.

Second, the secrecy surrounding the attorneys' fee award looks constitutionally infirm. The District Court denied the Class Member clients a review of any fee data, a review of any existing audits of fee data, a chance to ask questions about fee data, or any other active or passive participation in the fee process—and did so without a legal objection from Co-Lead Class Counsel to the publication of the data supporting its $112.5 million fee petition. Without any objective assurance that the lawyers did not, for example, overstate their hours or double bill on simple projects or bill for clerical time, the District Court granted the Fee Petition and, to assure payment of more fees, ordered Class Members to contribute 5% of their monetary awards—or a projected extra $39 million—to create a new fee fund. The Court's orders thus reserved to Class Counsel over $150 million in attorneys' fees

on an unproven class settlement. Concerned about these optics, the District Court, acting *sua sponte*, capped private fees at a presumptive 22% (17% after the holdback). Without any complaint from a single class member, the District Court separated all Class Members from their chosen counsel in favor of class counsel. The District Court completely ignored the two, irreplaceable advantages of retained counsel: (a) complete alignment of interest and (b) funding. Even if the District Court had jurisdiction to limit privately-contracted attorneys' fees prospectively, the District Court abused its discretion compromising class members' ability to fund and pursue monetary claims.

Finally, on May 24, 2018 (JA 84-110) the Court allocated $85,619,446.79 to twenty-six law firms. The District Court allocated without committee or Special Master or any type of consensus. The District Court allocated upon the recommendation Co-Lead Class Counsel Seeger who, not coincidentally, valued his firm's contributions as exponentially greater than any other lawyer or law firm. That recommendation includes a zero allocation to any lawyer who objected to the Settlement Agreement, unless the objector withdrew the objection. The Aldridge Objectors' counsel, Lance Lubel, was one such objector who received zero, notwithstanding his firm's common-benefit contributions *invited* by Co-Lead Class Counsel, *accepted* by Co-Lead Class Counsel and, through allocation, *unrefuted* by Co-Lead Class Counsel. Objectors' contributions must be considered, at least. Co-

Lead Class Counsel led the District Court into error with a punitive allocation proposal.

This Court should reverse the District Court's Article XXI fee orders. The Court should remand all questions about common benefit fees to the District Court with instructions to implement transparent, unbiased procedures for resolving the fee questions—procedures that stage or stagger the payment of such fees on a schedule that tracks actual, not projected, payments to the Class Members.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

Issue presented number one includes the district court's denial of open access to attorneys' fee time records that form the basis for the subject $112.5 million award. The Court's "exercises a plenary review" over questions of open access. *See In re Cendant Corp.*, 260 F.3d 183, 191 (3d Cir. 2001). As to the remaining issues, the District Court's class action, fee determinations are generally reviewed for abuse of discretion. *See In re Baby Products Antitrust Litigation*, 708 F.3d 163, 172 (3d Cir. 2013). Such an abuse of discretion occurs where "the District Court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 783 (3d Cir. 1995).

II. THE DISTRICT COURT'S PROCESS FOR AWARDING A REASONABLE COMMON BENEFIT FEE WAS NOT A "PROPER PROCEDURE."

The District Court abused its discretion and violated due process in its administration of the fee provisions of the Settlement Agreement. Though Third Circuit authority requires a "proper process" for the determination of class counsel fees, the district court employed no proper process. The District Court refused class members' participation in the process to test the reasonableness of the fees claimed by class counsel or the undisputed conflict of interest of the court's appointed fee expert. The District Court then based the fee decisions on attorneys' fees records reviewed *in camera* without a precipitating objection. These procedures are an abuse of discretion lacking transparency, fairness, and reviewability.

A. As A Fiduciary, A District Court Must Use Proper Procedures.

A District Court unquestionably has discretion to fashion a system for reviewing Class Action fee petitions for common benefit funds. A court must exercise that discretion within certain parameters from this Court; that is, a district court abuses its discretion when it fails to apply "the proper procedures in making the [fee] determination." *In re Cendant Corp. PRIDES Litig.,* 243 F.3d 722, 727 (3d Cir. 2001) (internal quotations and citations omitted). Proper procedures insure transparency. *In re Diet Drugs Product Liability Litigation*, 582 F.3d 524, 538 (3d Cir. 2009). Proper procedures include reviewability. *See Pawlak v. Greenwalt*, 713 F.2d 972, 978 (3d Cir. 1983); *see also* Manual for Complex Litigation (Fourth)

section 14.213 (2011) (holding that "[i]mposing record-keeping procedures and requiring submission of periodic reports 'encourages lawyers to maintain records adequate for the Court's purposes,' and facilitates Court review of later-submitted fee petitions, if any").

Transparent procedures are intertwined with the Court's role as "a fiduciary for the class" in conducting the fee analysis. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307-08 (3d Cir. 2005) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001). Secrecy is the antithesis of the discharge of the fiduciary duty because Class Member confidence in the process is a component part dependent upon open access to proceedings. *See In re Cendant Corp. Litig.*, 260 F.3d 183, 192 (3d Cir. 2001). That is, class members—the public—are entitled to the same common law public right of access to judicial proceedings and records in a class action suit as any other civil or criminal action. *See id.* (citing *Littlejohn v. BIC Corporation,* 851 F.2d 673, 677–78 (3d Cir.1988)). Here, the District Court abused its discretion because, having established proper procedures for the review of common benefit fee petitions, the Court failed to use those procedures.

B. Proper Fee Procedures and Resources Were Available to the District Court.

In 2012, long before the Fee Fund became a siren song to Co-Lead Class Counsel, the District Court entered Case Management Order No. 5 ("CMO 5"). (JA 948-959). As the "protocol for the submission and review of [common benefit]

attorneys' fees and expenses" CMO 5 (a) put a "reasonableness" fee-petition plan in place to capture data; (b) appointed an auditor to police that data on a regular schedule; and (c) pre-determined the compensable—reasonable—categories for reimbursement. The Court even provided the form for quarterly data submission, a Summary Time and Expense Report Form:

Attachment A

CASE NAME: NFL PLAYERS' CONCUSSION INJURY LITIGATION, MDL NO. 2323

REPORTING PERIOD: Inception thru

FIRM NAME:

SUMMARY TIME REPORT Timekeeper Name	Professional Status*	Current Hourly Rate	Pleadings, Motions, Briefs & Legal Research	Preparing & Responding to Discovery Requests	Factual Research and Analysis	Document Analysis	Depositions (including Preparation)	Officially-Called Meetings of Counsel	Common Benefit Case Management	Court Appearances	Trial Preparation & Trial	Appeals	Settlement	CURRENT TIME REPORTED Hours	CURRENT TIME REPORTED Hours x Hourly Rate	CUMULATIVE TIME REPORTED Hours	CUMULATIVE TIME REPORTED Hours x Hourly Rate
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
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														0.00	-	0.00	-
														0.00	-	0.00	-
														0.00	-	0.00	-
TOTALS			0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	-	0.00	-

*Professional Status: P-Partner A-Associate OC-Of Counsel PL-Paralegal LC-Law Clerk

(JA 58; ECF 3710).

The District Court also explicitly articulated **noncompensable** fee and expenses categories such as:

(a) time billed for activities prior to the [1/27/12] formation of this MDL[2];

(b) read and review time for persons not overseeing or directly participating in a project;

(c) time spent creating and compiling the time and expense reports outlined in these Time and Expense Reporting Guidelines;

(d) clerical time, including time spent preparing hearing or meeting notebooks, copying, filing, making travel arrangements or calendaring dates;[3]

(e) time billed by multiple people in the same firm, unless justified by the work that has been assigned to the firm in relation to the particular task;

(f) alcohol, first-class travel, or undocumented expenses.

The Court never vacated this order.

In addition to CMO 5, the Court had other professionals in place and available to assist with the resolution of common benefit fees: a Special Master the Honorable David R. Strawbridge, U.S. Magistrate Judge for the Eastern District of

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[2]Although the District Court concluded in CMO 5 that attorney effort prior to the formation of the MDL was "noncompensable," the Court nonetheless used those noncompensable hours to calculate the lodestar multipliers. (JA 951, 8971-97).

[3]As "clerical time" is among the noncompensable categories, it is unclear why Co-Lead Class Counsel included billing for the time of seventeen, separate paralegals as part of the Petition for Fees billed at rates ranging from a low of $125 per hour (ECF 7151-9) to a high of $475 per hour (ECF 7151-6). Under the District Court's common benefit blended rate, used to cross check the percent of fund award, paralegal time is "compensated" at a rate of $ 623.05. (JA 8781).

Pennsylvania already administering many issues (i.e. petitions for individual attorneys' liens; JA 7289); and, within a short time later, a Court's attorneys' fee expert appointed in 2018 to consider a percentage holdback and an IRPA cap. The "proper procedures" and ample supportive resources were in place.

And, of important note about the procedures and resources available for the fee-petition management, none came at any cost to the Class Members. CMO 5 forbid Class Counsel to seek compensation for "time spent creating and compiling the time and expense reports" outlined in CMO 5. (JA 951).

C. Co-Lead Class Counsel Failed to Follow the District Court's Case Management Order Governing Fees.

Co-Lead Class Counsel filed its Petition for Fees in February 2017, seeking the entire $112.5 Common Benefit Fee Fund on behalf of twenty-four law firms. The Petition for Fees did not follow CMO 5. Although the Petition suggests that those procedures were followed, Co-Lead Class Counsel allocates to himself the duty to "collect[ ] and review[ ] submissions of common benefit time and reimbursement costs and expenses." (JA 6663). CMO 5 delegates that duty to the Court's Auditor tasked with review of the Time and Expense Reports. The Petition for Fees makes no mention of the Auditor and does not purport to rely upon the Time and Expense Reporting forms or guidelines of CMO 5.

Instead, Co-Lead Class Counsel's Petition for Fees relied entirely upon the declaration of Mr. Seeger for "reasonableness." Mr. Seeger did not simply advance

the reasonableness of all time spent by his firm—that is, the 7 partners, 3 of-counsel attorneys, one associate, one contract attorney, and six paralegals. Mr. Seeger actually vouched for "reasonableness" of the time and expense of every partner, associate, and paralegal working for all twenty-four law firms, stating that he "deemed all work being billed [as] reasonable, necessary, and non-duplicative" because it was work "performed under his aegis." (JA 7329-30). As such, Co-Lead Class Counsel armed the Court with nothing more to support a $112.5 million award than Mr. Seeger's ipse dixit that the billed time meets any threshold for reasonable. Each law firm did submit a declaration suggesting general contributions, but it is Exhibit 1 to each declaration that outlines "the details." For example, Co-Lead Class Counsel submitted the following Exhibit 1 for Class Counsel Diane Nast:

NASTLAW LLC (including RodaNast, P.C.)
LODESTAR REPORT
Inception through July 15, 2016

NAME	HOURS	HOURLY RATE	AMOUNT
PARTNERS:			
Dianne M. Nast	688.9	$800	$551,120.00
ASSOCIATES:			
Daniel N. Gallucci	64.8	$575	$37,260.00
Erin C. Burns	238.4	$560	$133,504.00
PARALEGALS:			
Michael D. Ford	79.0	$215	$16,985.00
Emily C. Bell	86.1	$225	$19,372.50
Diane Brown	54.55	$125	$6,818.75

TOTALS:	1211.75		$765,060.25

These Lodestar Reports are the only public information supporting the lodestar cross check for $106,817,220.62 in attorneys' fees. These Exhibits do not provide any of the detail required by the District Court in Exhibit A to CMO 5 excerpted above—the Time and Expense forms designed to ensure the reasonableness of the billing.

D. The District Court Failed to Enforce its Case Management Order and Failed to Provide Reasonable Alternative Procedures.

The Aldridge Objectors challenged the lack of supporting data and asked for either CMO 5 data or an opportunity to take limited discovery on the non-specific allegations of compensable time. (JA 7931-32). The Aldridge Objectors challenged Co-Lead Class Counsel's competence to "deem" every hour worked by every lawyer and paralegal in all 24 firms or every dollar bill by those firms to be reasonable, necessary, and non-duplicative. As an alternative, the Alexander Objectors sought leave to serve limited fee-petition discovery. (JA 7750-54). Co-Lead Class Counsel opposed these requests, arguing that the discovery was not necessary for the "back of the envelope" analysis the Court was doing. (JA 7817). However, at no point did Co-Lead Class Counsel make a legal objection to the public revelation of CMO 5 data. Not confidentiality. Not attorney-client privilege. Not attorney work product. Still, the District Court did not order the CMO 5 data released and did not rule on the motion for discovery until after the Court granted the Petition for Fees in its

entirety, at which time the Court determined the request for discovery was *moot*. (ECF 9898).

E. The District Court's Appointed Fee Expert Had a Conflict of Interest as a Former Consultant to Class Counsel.

The Court proposed appointing Professor William B. Rubenstein of Harvard Law School as an expert witness to advise the Court on two issues: (1) caps on the attorneys' fees of individually retained plaintiffs' attorneys ("IRPAs") and (2) Class Counsel's 5% holdback request. (JA 7872; ECF 8310) The Aldridge Objectors pointed out that Professor Rubenstein had a direct conflict of interest that precluded the appointment. (JA 7898-908) Specifically, Professor Rubenstein was retained to consult for the Plaintiffs' Steering Committee. (JA 7921-22). But after Professor Rubenstein (apparently informally) "explained to the Court" his "prior involvement in this case," the Court appointed Professor Rubenstein. (JA 7923-24). The Court assured, however, that "the parties will, in due course, have an opportunity to pursue any concerns that Professor Rubenstein's [involvement] biased his opinions via a deposition. (*Id*.) In a subsequent order, however, the Court reversed course and declined the deposition, stating that Professor Rubenstein's report was comprehensive and, thus, the Court would permit nothing more than written responses to it. (JA 8376). Yet, Professor Rubenstein did not address the conflict in his reports. (JA 8281-328, 8477-84).

The plain language of Federal Rule of Civil Procedure 706 contemplates a

deposition of the Court's expert. Fed. R. Civ. P. 706 (noting that the Rule 706 expert "(2) may be deposed by any party"). The purpose of Rule 706 is "to promote accurate factfinding." *See* 29 Charles Allen Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* § 6304 (1997). Ultimately, the District Court failed to address or acknowledge Professor Rubenstein's undisputed conflict or its impact on his ability to impartially advise the Court. (JA 8376).

F. The District Court Improperly Conducted an *In Camera* Review of "Time Records" and Never Permitted Others to Submit Briefing or Argument on Those Records.

Throughout the fee petition briefing, Co-Lead Class Counsel steadfastly urged that the Court needed nothing more than summary lodestar information for a crosscheck. Ultimately, the Court disagreed and requested copies of "time records." At the time, neither the request nor the tender was public. The District Court relied upon an *in camera* review of those "time records" in rendering its fee decision. (JA 8780). The fact that the District Court obtained and relied upon the *in camera* submission was not made public until the Court's fee decision was announced. As part of the revelation of the *in camera* review, the Court offers no reference to a single objection that would support keeping those records secret. *Id.*; *see LEAP Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 220-21 (3d Cir. 2011) (citing *In re Cendant Corp.*, 260 F.3d at 190 (stating the limitation on a Court's power to order a judicial

record sealed when justice requires but only if the party seeking a seal overcomes the presumption of access)).

The District Court erred when it reviewed "time records" *in camera* because there was not and is not a legal basis to keep the records secret. Co-Lead Class Counsel offers no case that holds otherwise. In *Haozous*, a Tenth Circuit case cited by Co-Lead Class Counsel, the attorney seeking fees urged attorney-client privilege and attorney work product objections and the Court sustained those objections. *Team Sys. Int'l, LLC v. Haozous*, 706 Fed. Appx. 463, 466 (10th Cir. 2017). And, in *Haozous*, the attorney seeking fees was not class counsel so he was not seeking to conceal the basis for fees claimed from his own client. In every other case cited by Co-Lead Class Counsel to retroactively justify the District Court's *in camera* review, there was no issue before the appellate court about the propriety of *in camera* review. *See In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 623 (8th Cir. 2017) (no error urged in *in camera* review); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 188 (W.D.N.Y. 2005) (same); *Seiffer v. Topsy's Int'l, Inc.*, 80 F.R.D. 272, 278 (D. Kan. 1978) (same); *Ott v. Mortg. Inv'rs Corp. of Ohio, Inc.*, No. 3:14-CV-00645-ST, 2016 WL 54678, at *2 (D. Or. Jan. 5, 2016) (same); *Pabst v. Genesco Inc.*, No. C 11-01592 SI, 2012 WL 3987287, at *1 (N.D. Cal. Sept. 11, 2012) (same); *FTR Consulting Grp. ex rel. Cel-Sci Corp. v. Advantage Fund II Ltd.*, No. 02 CIV. 8608 (RMB), 2005 WL 2234039, at *2 (S.D.N.Y. Sept. 14, 2005)

(same).

The District Court abused its discretion by supporting its decision to award $112.5 million in common benefit fees based upon documents that Class Members could not see. The Court did not simply hold that the data was not required. The Court based a $112.5 million decision in part on secret information and such secrecy undermines class member confidence in the system demanded by this Court. In *In re Cendant* the Court stated: "The practical effect of the right to access doctrine is to create an independent right for the public to view proceedings and to inspect judicial records." 260 F.3d at 193.

That right of public access is "particularly compelling" when the members of the "public" from whom the court records are withheld "are also plaintiffs in the class action." *Id.* In the class action context, a right to access court (a) diminishes the possibility that "injustice, incompetence, perjury, [or] fraud" will be perpetrated against class members and (b) promotes the perception of fairness because it provides class members with "a more complete understanding of the [class action process]. *Id.*

A District Court does not commit error solely because it does not afford discovery of Class Counsel billing records before a common benefit award. *See e.g. In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 342 (3d Cir. 1998). And, a District Court does not commit error solely because it does

not make public individual billing records. *See In re Diet Drugs*, 582 F.3d 524, 539 (3d Cir. 2009) (holding that, where the Court required Auditor data and Plaintiffs' Liaison Counsel data to be "on the public record" and used that data "to support the fee award that it ultimately granted, public billing records were not necessary). But the District Court did not choose between reasonable alternatives; the Court abandoned all processes of transparency.

The District Court told the Class Members that attorneys' claims for money would be based upon contemporaneous data. The claims would be audited, just like their own claims, to prevent overreach and fraud. Once the money arrived, the District Court used secret documents, first, to "determine that the hours submitted by Class Counsel are a fair and reasonable representation of the work performed"[4] so that all of the $112.5 should be awarded and, then, to institute a 5% holdback from class members to pay additional fees. (JA 8780-82). No Time and Expense Reports Forms. No audit. No impartial legal expert. No Class Member participation. And, because the Court's analysis rests upon secret records, its decision is unreviewable by this Court. As such, this Court should reverse and remand Co-Lead Class Counsel's Petition for Fees to the District Court with

[4] A finding that work "was performed" does not cross check a percentage fee. Reasonableness is the inquiry. *See In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 305 (3d Cir. 2005).

instructions to follow the procedure the District Court established for seeking common benefit fees or some commensurate "proper procedure."

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN ENTERING RELATED FEE ORDERS AWARDING COMMON BENEFIT FEES, HOLDING BACK 5% OF CLASS MEMBER'S MONETARY AWARDS, AND LIMITING PRIVATE ATTORNEY FEES.

Co-Lead Class Counsel filed its February 13, 2017 Petition for Fees seeking "a total award of $112.5 million" for services rendered "in this MDL to date." (JA 6571-72). Co-Lead Class Counsel requested the District Court make this award on a percentage-of-recovery method and calculated the fee sought as "about nine percent of the value of the benefits conferred on the Class." *Id*.

A. The District Court Abused Its Discretion by Awarding a Percent of the Recovery Fee on the Projected Value of the Fixed and Contingent Class Action Benefits.

1. The Gunter/Prudential factors do not support the district court's premature percent of recovery award on an actuarial valuation of the 65-Year, uncapped settlement.

This Court instructs that a District Court must consider the following ten *Gunter/Prudential* factors to analyze what constitutes a reasonable percentage fee award:

> (1) the size of the fund created and the number of beneficiaries,
>
> (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel,
>
> (3) the skill and efficiency of the attorneys involved,
>
> (4) the complexity and duration of the litigation,

> (5) the risk of nonpayment,
>
> (6) the amount of time devoted to the case by plaintiffs' counsel,
>
> (7) the awards in similar cases,
>
> (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations,
>
> (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and
>
> (10) any innovative terms of settlement.

See Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n. 1 (3d Cir.2000); *see also In re Prudential*, 148 F.3d at 342. The District Court failed to fully or properly analyze the most critical factors.

Factor 1: Size of the Fund; Number of Beneficiaries.

A percentage-of-recovery method of assessing attorneys' fees for a common benefit fund begins with an assessment of the size of the fund created and the number of beneficiaries. *See id.* It is the most important factor among the ten factors for analysis. *See In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico*, on April 20, 2010, 2016 WL 6215974 (E.D. La. Oct. 2, 2016) ("*Deepwater Horizon*"), citing *e.g. Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (noting that the "degree of success [is] the most critical factor in determining the reasonableness of a fee award"). But success is not measured solely by the gross amount of recovery; the Court must also consider "the number of individuals who benefit from the class

settlement" and "the degree to which it provides them full compensation for their injuries." *Id*. And, yet, Factor 1 is the factor upon which the District Court's analysis here most critically fails.

In connection with Factor 1, the District Court first determined that all of the 20,542 registrants to the Settlement Agreement are, in fact, beneficiaries. Then, the District Court determined that (a) it is appropriate to award percent of recovery fees on a contingent fund; and (b) this contingent, 65-year, uncapped Monetary Award Fund may be reasonably valued using actuarial data prepared for settlement negotiations. In all, Co-Lead Class Counsel valued the benefits conferred on the Class at almost 1.2 billion by adding the fixed benefits achieved and the projected value of the contingent benefits, as follows:

FIXED BENEFIT FUNDS	AMOUNT/VALUE
Baseline Assessment Program (hereinafter "BAP")	$ 75,000,000
Education Fund	$ 10,000,000
Notice Costs	$ 4,000,000
Claims Administration	$ 11,925,000
Attorneys' Fees Provision	$ 112,500,000
SUBTOTAL	$ 213,425,000

CONTINGENT BENEFITS FUND	AMOUNT/VALUE
Monetary Award Fund (hereinafter "MAF")	$ 950,000,000

(JA 2340) (NFL Concussion Liability Forecast)	
TOTAL	$ 1.16 billion

- ***Number of Beneficiaries:*** ***The District Court erred counting all registrants as beneficiaries of the fixed and contingent benefit funds.***

For this category, the District Court used Class Action registrants, concluding the "number of beneficiaries" was the number of class action registrants—20,542. (JA 54). The Court erred because the registration number bears no relationship to the "number of beneficiaries." Registration is no guarantee of benefits. Not all registrants "qualify" as Class Members. *See* NFL Concussion Settlement website, Summary of registrations and claims submitted (over a thousand registrants are not Class Members). Not all Class Member registrants are eligible to participate in the BAP fund. *Id*. as of 8.5.19 (currently, 6,552 registrants or roughly 1/3 of the registrants are not BAP eligible). Not all registrants will seek or qualify for monetary awards under the MAF. *See* NFL Concussion Settlement website[5], 8.5.2019 reports (currently less than 14% of the total registrants have submitted claim packages for MAF award and less than 28% of the registrants who have filed claims have been paid)

We know there will never be 20,542 MAF beneficiaries. As such, although it

5 https://www.nflconcussionsettlement.com/Docs/8_5_19_report.pdf

is not clear how many registrants will receive any benefit whatsoever or how much, it is clear many will receive no benefit at all. The District Court's "registrations = beneficiaries" analysis is wholly flawed.

- ***Size of the Fund:*** ***The District Court erred valuing the 65-year, uncapped Monetary Award Fund.***

The District Court committed two, independent errors in evaluating the size of the fund: First, the Court should not have awarded on a speculative, 65-year fund at all. Second, even if the Court correctly used a projected recovery to award a percentage, the Court erred here using unreliable projections.

A District Court should not award any percentage-of-fund fee on a fund that is not capable of reasonable estimate. *See Prudential at* 334 (holding that an uncapped fund not capable of valuation even under the "reasonable estimate"). The percent of recovery common-benefit fee is akin to a private contingent fee; it is calculated upon the client's recovery, not possible recovery. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819 n.38 (3d Cir. 1995). It should not be used when "the amount recovered for the class" can only be determined by "subjective evaluations." *Id* at 821. That does not mean that Class Counsel never obtain a percent of recovery award; it means that percent of recovery should not be used *until* the amount *to be distributed* by the Settlement Agreement can be determined with reasonable accuracy. *See In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013) (vacating an award of class attorneys' fees).

Even if the Court did not abuse its discretion using a percent-of-fund methodology on a 65-year fund and actuarial data, the Court nonetheless erred relying upon data that could not afford a reasonably accurate computation of the eventual size of the fund. The District Court extrapolated a valuation from settlement-negotiation actuarial data.[6] Yet, it is undisputed that such actuarial data rests upon subjective assumptions, such as participation rates. (JA 4506; ECF 6423-21).

There is a central flaw in the District Court's reliance upon the Vasquez data to forecast the size of the fund. Vasquez analysis depends upon a participation-rate analysis when there is no reliable forecast for Level 1.5 or Level 2 participation. Recalling that the Level 1.5/2 qualifying diagnosis makes up 94% of all monetary participants, any flaw in the analysis of Level 1.5/2 participation renders the entire analysis worthless. (JA 7679, Table 7-1 from Updated Analysis of the NFL Concussion Settlement by Thomas Vasques, Ph.D.). Yet, no one can reliably forecast the Level 1.5/2 incidence because there is no medical data from which to extrapolate; that is, this "disease" level is purely a creature of the settlement and so

[6] The purpose of Vasquez' participation-rate guestimates, at the time of the forecast, was to assure funding to pay all eligible Class Members. Vasquez' actuarial data supported a conclusion that $675 million would be a sufficient sum to pay all eligible Class Members. Now that the MAF is uncapped, Co-Lead Class Counsel values the MAF at $950 million without any additional support.

these diagnostic criteria do not exist in medical textbooks or medical literature. Alzheimer's disease, for example, can be extrapolated from World Health Organization data because it is a published standard that physicians use. But, for Level 1.5/2, there is no way anyone can know how many Class Members will successfully shoehorn themselves into a made-up category of diagnosis that is "generally consistent with the diagnostic criteria set for Qualified BAP Providers."

As evidence that forecast was not reliable, the current data show this category is not performing at the rate of other categories:

	CTE	ALS	Alzheimer's	Parkinson's	Level 2	Level 1.5
Claims submitted	126	55	475	165	718	1,057
Claims paid	74 (58%)	36 (65%)	254 (53%)	115 (70%)	93 (13%)	171 (16%)

Factor 1 is designed to test the success of a Class Action Settlement Agreement. The unique circumstances of this Settlement Agreement render any decision about success premature until the claims process, implementation, bears measurable fruit in all diagnostic categories. This Court should be persuaded this settlement agreement was not suitable for a Year Three percent-of-fund award where even class counsel suggests that the implementation process is derailing. (*See e.g.* ECF 9785, pp. 2-3). Class Members' claims are being delayed or denied because of implementation roadblocks created after the settlement was achieved and approved. (*See* JA 8700-17) (documenting the, to date, eight-month delay in paying client claims that received a notice of monetary award).

The Court's "size of the fund" error is, at its core, a timing error. The Court erred in concluding that, under these circumstances (an uncapped, 65-year fund to which class members must apply and qualify), implementation is the proper time to declare a sum-certain success. (JA 8766) (stating "[n]ow that implementation [of the Settlement] is in progress, it is time to focus on attorneys' fees"). Class Counsel was not entitled to an immediate percentage of a contingent, untested fund; Class Counsel often wait for success to be revealed. *See In re Diet Drugs* 582 F.3d at 534-35 (holding the final "definitive" fee analysis on a $6.4 billion settlement for more than five years).

Moreover, staged or staggered fee payments are an appropriate methodology in 'atypical common fund case[s]' involving an uncapped, 'future fund' whose ultimate value [is] dependent on the final number of claims remediated under the settlement." *Prudential,* 148 F.3d 283, 334 (3d Cir.1998) (quoting *In re Prudential Ins. Co. of Am. (Fee Opinion)*, 962 F. Supp. 572, 583 (D.N.J.1997)) (approving the two-part structure: (1) calculating fees as a percentage of the guaranteed minimum settlement amount and (2) calculating the remaining fees as a percentage of the future payments). This methodology eliminates "the need to guesstimate the value of the settlement." *Id.* at 333 (quoting *Fee Opinion*, 962 F. Supp. at 589). No matter how Co-Lead Class Counsel casts the uncapped MAF, it is of no benefit to Class Members who find the eligibility hurdle too high to jump. It is little better than a

lottery ticket.

Factor 4: The Complexity and Duration of the Litigation.

The District Court began analysis of this factor correctly observing that Class Counsel here conducted no discovery. There was no document discovery in this case. There were no depositions taken. There was no expert discovery. There was essentially one-motion practice concerning the merits of the claims in this case; that is, NFL filed a motion to dismiss.

The Judicial Panel on Multidistrict Litigation established this MDL on January 31, 2012. (JA134). The Court ordered the parties to mediation in July 2013 (1 ½ years later), and no further merits litigation occurred after that point. (JA361). Compared to other MDL Class Actions, this litigation cannot be earnestly characterized as having been complex or lengthy. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, No. 01-12257- PBS, 2008 U.S. Dist. LEXIS 111835, *78 (D. Mass. Oct. 2, 2008) (award of 30% of a common fund found to be fair for litigation that took place over seven years); *see also Williams v. Rohm and Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (award of 24% of a common fund found to be fair for ERISA litigation that took place over eight years).

Still, the District Court ultimately analyzed this factor in favor of an award because Class Counsel retained experts, economists and actuaries as advisors. (JA 8775). The District Court's reasoning on this factor is circular, finding that Class

Counsel's 50,000 hours of billing establishes the complexity of the litigation. In fact, the District Court found this factor supported by the fact that "Class Counsel will continue to bill hours as the Settlement is implemented over the next 65 years."

Factor 5: The Risk of Nonpayment.

Co-Lead Class Counsel urged that this factor favored a substantial percentage because there was a significant risk of nonpayment. (JA 6607-10) (stating that "[t]he risk of non-payment to Plaintiffs' Counsel was therefore, to say the least, considerable"). The District Court disagreed and analyzed the fifth factor as "an assessment of the financial health of the defendant and the likelihood that it will be able to satisfy a successful judgment against it." *Rite Aid*, 396 F.3d at 304. The District Court said there was no risk of nonpayment. (JA 8776; ECF 9860) (noting that "[t]he financial solvency of the NFL was not an obstacle in this litigation"). Thus, this factor disfavors a large percentage.

Factor 6: The Amount of Time Devoted to the Case by Plaintiffs' Counsel.

"In calculating the second part of the lodestar determination, the *time* reasonably expended," a district court should "review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are excessive, redundant, or otherwise unnecessary." *Pennsylvania Envtl. Def. Found. v. Canon-McMillan Sch. Dist.*, 152 F.3d 228, 232 (3d Cir. 1998). Through the Petition for Fees, Co-Lead

Class Counsel stated that Class Counsel spent over 50,000 hours on the case. As outlined in Section I, the fee process adopted by the District Court—secrecy on the "time records" reviewed in camera—it is not possible for the Aldridge Objectors or anyone else to analyze this factor. What the public record does allow the Aldridge Objectors to point out is that very little of the time alleged to have been devoted by Class Counsel is verifiable from the filings before the Court. (*See e.g.* JA 6640-78) (outlining telephone calls, meetings, email exchanges, supervising and monitoring tasks).

Factors 7 and 10: Awards in Similar Cases; Unique Features.

The Aldridge Objectors analyze these two factors together because this Settlement Agreement has two unique features that render critically askew any comparison to cases without such features: It is uncapped, and it has a 65-year duration. These features, while potential positives for Class Members recovery, are the most challenging aspects of achieving reasonable compensation for Class Counsel's common benefit work. As outlined above in connection with Factor 1, the contingent nature of the MAF fund renders the total benefits recovered incalculable. This Court has, however, encountered a case with just such a feature. That is, *Prudential*. 148 F.3d at 334 (uncapped fund not capable of valuation even under the "reasonable estimate" standard). In *Prudential*, the district court noted, this is "an atypical common fund case" involving an uncapped, "future fund" whose

ultimate value is dependent on the final number of claims remediated under the settlement, and, as a result, "the settlement ... cannot reasonably be valuated." *Fee Opinion*, 962 F. Supp. at 583.

Because the future or contingent fund was not capable of present valuation, the district court bifurcated the fee award in a methodology approved by this Court. The bifurcation methodology served "to overcome the speculative nature of the tentative and imprecise settlement valuations." *Id*. As this Court noted, the district court's process "took into account the settlement's more definite terms by providing an immediate payment based on a percentage of the guaranteed minimum recovery of $410 million, while requiring future payments to be based on actual results in recognition that the ultimate class recovery is not quantifiable at this point. As such, the bifurcated fee structure was an appropriate and innovative response to the structure of the settlement. *Id*. The District Court has incorrectly analyzed Factors 7 and 10 by comparing apples (a 65-year uncapped fund) to oranges (sum-certain funds).

Factor 8. The Value of Benefits Attributable to the Efforts of Class Counsel Relative to the Efforts of Other Groups, Such as Government Agencies Conducting Investigations.

This factor analyzes whether the efforts culminating in the Settlement were aided by, for example, government prosecutions or private cases. *See In re Diet Drugs*, 582 F.3d at 544. Co-Lead Class Counsel's Petition for Fees urge that the

litigation also encompassed "complex scientific and medical issues not yet comprehensively studied." (JA 6606). Although the NFL denied and continues to deny scientific and medical links between NFL concussions and the diagnoses at issue in this Settlement Agreement, it is preposterous to suggest that Co-Lead Class Counsel does not owe others—entirely—for the scientific knowledge about NFL concussions. Battling the misinformation campaign of the NFL's Minor Traumatic Brain Injury (MTBI) Committee formed in 1994, the scientific and governmental communities pushed back for twenty years ***before this lawsuit existed***:

- Dr. Barry Jordan and Dr. Julian Bailes announced research results of an association between concussions and neurological deficits at a May, 2001 annual meeting for the American Academy of Neurology;
- The next year, Allegheny County medical examiner Dr. Bennet Omalu identified a brain disease that had never been previously identified in football players, Chronic Traumatic Encephalopathy, or CTE;
- The next year, Dr. Kevin Guskiewicz, a sports medicine researcher at the University of North Carolina, revealed that repeat concussions may lead to slower recovery of neurological functioning;
- In 2009 and then again in 2011, Dr. Ann McKee from the Center for the Study of Traumatic Encephalopathy presents evidence in a Congressional hearing.

See https://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/. These dedicated scientists and the Congressional investigations they spurred provided a medical roadmap for litigation against the NFL.

Still Co-Lead Class Counsel suggests that it was "not aided" by the

government investigation and the District Court, without analysis, holds that the Congressional "proceedings undoubtedly provided some of the foundation for this litigation, the impact was limited." (JA 6616, 60). The District Court has inadequately or incorrectly analyzed Factor 8.

2. The district court's superficial lodestar cross check does not support the percent of recovery award.

Fundamentally, a lodestar award is calculated by multiplying the number of hours *reasonably worked on a client's case* by a reasonable hourly billing rate. *See Rite Aid,* 396 F.3d at 305. The lodestar crosscheck uses that lodestar calculation by "dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 3330 n. 61 (3d Cir. 2011) (quoting *In re AT&T Corp*., 455 F.3d 160, 164 (3d Cir. 2006).

The District Court failed to properly calculate the lodestar in this case. The District Court, in a single sentence of analysis, determined "that the hours submitted by Class Counsel are a fair and reasonable representation of the work performed." (JA 62). A lodestar crosscheck that credits all hours sought so long as the work was actually performed ignores counsel's need to exercise the judgment of a fiduciary, performing and billing for services only when those services are reasonably necessary.

Here, the District Court's opinion awarding fee upon lodestar crosscheck does not analyze or hold that the 57,898 hours claimed by Class Counsel were "reasonably

worked on [Class Members'] case." (JA 61). Class Counsel bills may faithfully reflect work performed, but did Class Counsel perform work that, for example, (a) is attributable to an individual client or (b) predates the formation of the MDL or (c) is duplicative of a lawyer from another firm?

As outlined in Section 1, the District Court had already established categories of work that would be considered expended reasonably for the common benefit of Class Members. (JA 950). The District Court says nothing of whether all of the hours claimed fit within those CMO 5 categories. The District Court did not analyze any Auditors report of Class Counsel's claimed efforts in compensable categories that the Court ordered conducted. (JA 956). For failure to determine, through proper procedures, the number of hours reasonably worked by Class Counsel on former NFL Players' case, the District Court's lodestar crosscheck provides no check whatsoever to the percent of recovery contemplated by the Court.

B. The District Court Erred in Holding Back 5% of Each Class Member's Monetary Award Fund Payment Because, with Proper Management, the Holdback is not Necessary.

Article XXI of the Settlement authorizes class counsel to petition the Court to set aside up to five percent (5%) of each Monetary Award and Derivative Claimant Award to facilitate the Settlement program and related efforts of Class Counsel. (JA

6151). Co-Lead Class Counsel filed just such a request[7] almost immediately after the effective date of the settlement and as a part of the initial fee petition. (JA 6555-56). Co-Lead Class Counsel said that the holdback is vital "to create an incentive for the multiple groups of lawyers who will be entrusted with shepherding the Settlement in the future to ensure that benefits continue to be provided to Class Members." (JA 7338). Mr. Seeger made those statements in April 2017, presumably of the opinion that $112.5 million did not create a sufficient incentive to Class Counsel but another $39,250,000 would.[8]

The Court's appointed expert, Professor Rubenstein, counseled against this course. (JA 8282). Professor Rubenstein advised the Court that the $112.5 Fee Fund is sufficient for all Class Counsel fees, present and future and outlined "at least six reasons" that Co-Lead Class Counsel failed in its burden to show a 5% holdback necessary. *Id*. at 8316. Two of those reason stand out: First, the Settlement Agreement does not support Co-Lead Class Counsel's justification for a holdback to fund "Settlement Agreement-*implementation*" services (while the $112.5 Fee

[7] The Settlement Agreement requires the petition for set aside to include the "proposed use" of the money. (JA 6151). Co-Lead Class Counsel's petition was so woefully inadequate in its boilerplate justification, that the petition drew objection from not only many objectors, but also *amicus curiae* Public Citizen (JA 418).

[8] This 5% computation assumes a net present Settlement value of $785,000,000 urged by Co-Lead Class Counsel.

Fund was just for Settlement Agreement-*securing*" services. *Id*. at 8316-18. Stated differently, the Settlement Agreement did not fix $112.5 as the fee solely for negotiating a settlement agreement. Instead, Co-Lead Class Counsel has artificially created categories of class services solely to justify greater fees. Coupled with the historical context—the holdback—is a settlement term added without explanation to the second Settlement Agreement—implied to Professor Rubenstein "that Class Counsel sought to significantly enhance their own fees without significantly enhancing their own work or, most importantly, their client's recoveries." *Id*. at 8317. Indeed, Class Counsel Seeger's newest fee petition spins yet another category to justify ongoing fees; having fully recovered for Settlement securing and implementing, Class Counsel Seeger is now "dedicated" to Settlement Agreement-*oversight and maintenance*.

Second, Professor Rubenstein explained that, with proper management of the $112.5 Fee Fund, the District Court could ensure that it would be enough for the entire term of the Settlement.[9] Specifically, Professor Rubenstein urged the District Court to (a) pay Class Counsel lodestar fees and a multiplier; conservatively invest the remainder of the Fee Fund; consider only lodestar fee awards in the future; and

[9] Professor Rubenstein provided a reply in which he urged the Court that a set aside of 2% would be a "last resort" to fund future work, but reiterated that the Court first turn to the NFL or other "adverse" litigants before taxing the monetary awards of Class Members for such additional fees. (JA 8482).

exercise "discipline" over Class Counsel's hourly rates. (JA8481-82). Professor Rubenstein further suggested that the District Court consider conserving the Fee Fund by taxing responsible parties when Class Counsel must invest a significant amount of time on a discrete issue. (JA 8482) (noting that the "assignments issue"—which has recently been disposed of by this Court—is such a discrete issue that perhaps should not be taxed to all Class Member without regard to whether they assigned any recovery). These suggestions, managing class funds conservatively, dovetail precisely with the District Court's fiduciary responsibilities. *See Rite Aid*, 396 F.3d at 307-08 (citing *In re Cendant*, 264 F.3d at 231). The District Court ordered the 5% holdback in full.

Professor Rubenstein also illustrated, "[f]ee awards at this level tend to purchase a far greater quantity of legal services than simply securing a settlement agreement. (JA 8320) (*citing, e.g. In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 1871, 2012 WL 6923367, at *1 (E.D. Pa. Oct. 19, 2012). Co-Lead Class Counsel did not disagree with this point in its reply. (JA 8432-41). And, indeed, Co-Lead Class Counsel cannot point to any authority that authorizes both a Fee Fund for Settlement Agreement-*securing* in addition to a substantial holdback for future fees. Co-Lead Class Counsel cannot have it both ways: Either Class Members recovered $1.2 billion in benefits or they recovered the opportunity for $1.2 billion, unrealized without class counsel's substantial future efforts.

Despite Professor Rubenstein's opinions, the District Court expressed a continuing concern that the money would run out before Class Counsel finished billing for services. As it is now configured, the District Court's 5% holdback ensures that Mr. Seeger has an uncapped, unchecked incentive to work on this Settlement Agreement for the remainder of his career. When sharing class counsel duties Mr. Seeger's cut of fees to negotiate the settlement exceeded $60 million. Mr. Seeger has billed his "implementation" fees and expenses at another $10 million. Now, as sole Class Counsel Mr. Seeger's first "oversight and maintenance" statement is over $1.5 million. (JA 9403, 9437). And, Mr. Seeger is unable to quantify or even estimate what his future bills for the new phase will be. (JA 8438). But, Mr. Seeger is able to say that he will need to bill for assisting unrepresented Class Members through the claims process; this disclosure should come as a surprise to Mr. Dennis R. Suplee, appointed by the District Court to perform that task. (JA 8476).

The duty grab is not academic. When Mr. Seeger bills for his time assisting unrepresented Class Members, his fee is paid by all Class Members from the 5% holdback. When Mr. Suplee bills for his time assisting unrepresented Class Members, his fee is paid from the MAF—by the NFL.

C. The District Court Erred in Capping Class Members' Private Counsel Fees at 22% (17% After Holdback).

At the same time the Court awarded common benefit fees, the Court also

ordered, *sua sponte* and without supportive argument from Co Lead Class Counsel,[10] a presumptive contingent fee cap on all private fee contracts with former NFL Players. (JA 80; ECF 9863) The cap applies regardless of the terms of the private fee agreement. The cap applies regardless of the date of the private fee agreement. And, though the order relies in large measure upon the mental capacity of the "protected" class member, the cap applies regardless of the mental status of the former NFL Player or the derivative-claimant class member.

The Court founded its decision to cap fees on the report and recommendation of the Court's expert. (JA 72). The Court's order is an abuse of discretion because (a) the Court does not have the authority under the present circumstances to alter the private agreements between counsel and any class member; (b) the Court's order rests upon a fact not supported by the record; to wit, every class member is incapacitated to the extent that the Court must protect each against his or her chosen counsel; and, indeed, (c) the Court's order capping such IRPA contracts harms class members.

1. The district court does not have the authority to limit these private fee contracts.

The Court's appointed fee expert, Professor Rubenstein, found it axiomatic

[10] The Court should not entertain any argument from Appellees on the IRPA cap point of error as Co-Lead Class Counsel concedes it has "taken no position on the individual fee cap issue." (*See* JA 9009).

that the District Court has the authority to limit private fees. (JA 8282) (relying heavily upon the Third Circuit authority providing "inherent authority to regulate attorneys appearing before it."). Such general authority is neither novel nor disputed. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 44–45 (1991) (noting Courts inherent authority to sanction attorneys "for conduct which abuses the judicial process") But no Third Circuit case relied upon by the Court's expert or the Court provides a Court with inherent authority to unilaterally rewrite a privately-negotiated contingent fee agreement. For example, in *Dunn v. Porter*, 602 F.2d 1105 (3d Cir. 1995), the Court applied Fed. R. Civ. P. 23 to limit **class counsel's** contingent fee. Non-class counsel IRPAs are "on slightly different footing." (JA 8294). That is why Professor Rubenstein acknowledges that Rule 23 "has no obvious application to individualized retainer agreements." *Id*. Thus, Professor Rubenstein mistakenly relies upon the *Dunn* opinion for "inherent authority."

Similarly *Mitzel v. Westinghouse Elec. Corp*, 72 F.3d 414, 417 (3d Cir. 1995) says nothing about a Court's inherent authority to trump a contract. The Court's authority to limit a fee derived from state statute, not inherent authority.

Notably absent from the District Court's analysis is any discussion of *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013) raised by the Aldridge Objectors. Under analogous circumstances, the *McCutchen* Court holds that the common-fund

doctrine does not provide a court with the inherent authority to trump a contract.[11] *See McCutchen*, 569 U.S. at 99-100 (stating that "if the agreement governs, the agreement governs"). Although the decision arises in the context of an ERISA plan, the reasoning derives from contract, not statute. *Id*. In short, there are no Third Circuit cases vesting the Court with inherent authority to revise or reduce the non-Class Counsel individual contingent-fee agreements.

2. Even if the district court has the authority, it abused its discretion exercising that authority here.

The District Court implemented a 22% cap on the fees of Class Members' private attorneys, finding that there is a "need for a fee cap" in this case because players with private lawyers are paying two sets of lawyers and because this case settled on "an aggregate basis," requiring no more than a modest level of work by these private lawyers who formed fee contracts with vulnerable clients. (JA 73).

The District Court's has, in the spirit of helping class members, gutted their chances of qualifying for an award through the claims process. Former Class Counsel Anapol Weiss aptly described the claims process as a "thicket" comprised of private litigation, changing qualifications and "unpredictable and changing

[11] The Court is also without jurisdiction to alter their privately negotiated contracts where, as here, there is no case or controversy regarding their fee contract or whether the client will achieve an award subject to fee. *See Brown v. Watkins*, 596 F.2d 129 (5th Cir. 1979). The Court undertook a private fee adjustment solely to compensate for fees awarded to Class Counsel.

standards of review." (ECF 9784). After all, the Settlement Agreement is no more than an opportunity for an award.

A class member's opportunity for an award depends upon a successful claims package. These class members may file a claim *pro se* or they may retain counsel. These are the same class members that the Court's expert likens to incapacitated minors. (JA 8296). Given the claims-thicket, the District Court has appointed hourly-fee counsel to assist class members on a case-by-case basis. (JA 8476). In other words, the District Court justifies cutting IRPA fees because counsel at this stage is largely superfluous but has *appointed* an attorney—not of the class member's choosing—to be on standby. Unlike appointed counsel, however, private counsel are aligned with class members and incentivized to file a successful claim.

But, the fee-cap blow to class members is not solely one of advocacy; it is funding. The Settlement Agreement does not provide all medical testing necessary to qualify. As illustrated above, settlement statistics show not all class members are eligible for the baseline assessment exam.[12] A recent BAP Administrator report shows that only a small percentage of class members who are eligible obtain a baseline exam qualify on the first test. *See* ECF 10652, p. 8; BAP Administrator Status Report – 2nd Quarter 2019. (showing that of the 3,666 class members whose

[12] *See* https://www.nflconcussionsettlement.com/Docs/8_5_19_report.pdf

BAP reports have been submitted to the administrator, 165 class members (4.5%) have qualified under one free BAP exam). Therefore, most class members - 95% of 94% - will need to self-fund. How?

Class Members cannot assign any future settlement benefits in exchange for medical-testing cash because of the anti-assignment clause of the settlement. *In re National Football League Players Concussion Injury Litigation*, 923 F.3d at 111. Class Members could seek a loan, but they must have (a) collateral and (b) a lender willing to risk the litany of contract defenses this Court recognized will be available due to class member "vulnerability." *See id*. Thus, despite neither evidence nor argument that a particular class member lacks contracting capacity, the Court has eviscerated the opportunity for any class member to obtain funding assistance because of a capacity "concern." *Id*. at 112, 112 n. 16.

The only source of claims-package funding is now the IRPA. The fee cap threatens that funding. For Level 1.5/2 class members (94% of the class), a private attorney, using business judgment, cannot justify advancing medical-testing costs necessary to enter the thicket and fight for $50,000. Stated differently, an effective 17% cap is a critical deterrent to private counsel's ability to invest up to $8,000 (to fund a qualifying MAF exam) in the hope of an $8,500 fee (17% of $50,000[13]). This

[13] As to Level 1s and Level 2s, Professor Rubenstein agrees that most payments will be at or near this $25-50,000 floor. (JA8304).

class settlement cannot fulfill its purpose with an IRPA cap.

The District Court's resort to *McKenzie Cost.*, *Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987) does not advance the reasoning for an IRPA cap. (ECF 7526, p. 27-28) (stating that the IRPA "generally did not 'substantially contribute' to 'the results obtained' given the aggregate resolution of the case). Indeed, it is circular reasoning in any class action; and it is illogical reasoning in this class action. If an IRPA cap is appropriate where a private lawyer does not contribute to achieving the settlement, then an IRPA cap would be appropriate in every class action because such a contribution is common benefit. If an IRPA cap is appropriate in this case based upon "results obtained," then the class members should not need to file claims packages to access those "results obtained." In other words, an IRPA cap in this case serves the interest of one party—the NFL. The fewer Level 1.5/2 Class Members who can pay for the qualifying tests, the fewer claims filed. That is a projected 94% of the class. The fewer filed or successful claims, the less money the NFL pays into the Monetary Award Fund. Albeit well-intentioned, the District Court's decision is an abuse of discretion because it will cut IRPAs from the process to the benefit of the NFL.

The District Court also neglects an apples-to-apples critical analysis of IRPA caps. Of the thirteen cases set forth by Professor Rubenstein and relied upon by the Court, none is similar in any material way. None contains a fee fund for common

benefit fees. In fact, the *Rio Hair Naturalizer* Court concluded that the 5% IRPA fee awarded was reasonable only because the settlement structure was "limited fund"—that is, the Defendant had no further assets. *In re Rio Hair Naturalizer Prod. Liab. Litig.*, No. MDL 055, 1996 WL 78051 *20 (E.D. Mich. Dec. 20, 1996). None rewards class counsel a percentage fee for securing a settlement that, by definition, does not pay a class member without claims-processing litigation (claim, medical panels, appeals, audits). And, not a single case analyzed, not a single capped fee mentioned, was tested through the appellate court. As such, they provide no reliable legal foundation for this Court's imposition of a contingent fee cap.

IV. THE COURT COMMITTED ERROR IN ALLOCATING ZERO TO LANCE LUBEL FOR HIS CONTRIBUTIONS TO THE COMMON BENEFIT OF THE FORMER NFL PLAYERS.

A. The Procedures Used by the District Court to Allocate Common-Benefit Fees Lacked Fairness, Transparency, and Adequate Judicial Supervision.

The Aldridge Objectors adopt the Joint Opening Brief of Appellants Addressing the Common Benefit Fee Allocation Order and further urge that, viewed in context with the common benefit fee-petition process failings that the Aldridge Objectors argue here, this Court should direct the District Court to revisit all common benefit fee issues with specific direction on transparent procedures that should include (a) revelation of Auditor's reports on CMO 5 data; and (b) referral of

allocation issues to Special Master or Fee Committee for the purpose of making an unbiased allocation proposal to the District Court.

B. The District Court's Allocation of Zero to Lance Lubel, Principally Because he is Counsel for Unrepentant Objectors, is Error.

The Supreme Court has consistently recognized "that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.*

The District Court's allocation order unjustly enriched the class because Lance Lubel's efforts were not compensated. The District Court allocated $85,619,446.79 in common benefit funds to pay attorneys for their work in "**securing**" the Settlement in this case. Of that sum, the District Court allocated $51,737,185.70 to Co-Lead Class Counsel Seeger. Co-Lead Class Counsel thus received, for services through February, 2017, over 60% of the common benefit fees, a sum that represents a 3.5 lodestar multiplier that is well beyond any other class counsel.[14]

[14] As Co-Lead Class Counsel has received another $7,611,859.28 in common benefit fees for implementation services through May 24, 2018 (JA 9052, 118); has a requested more for implementation services through November 30, 2018 (JA 9383);

The District Court allocated zero to Appellant Lance Lubel. The Court's entire reasoning for the decision is:

> The [Aldridge] Objectors have filed repeated and largely redundant pleadings seeking fees for themselves and objecting to the fee petition submitted by Co-Lead Class Counsel. The firm has argued that they have provided "well over 1,000 hours attempting to improve the terms of the settlement." [JA 8187-88]. I have reviewed all of the pleadings filed by the Alexander Objectors and conclude that the arguments are too voluminous to restate here. Common benefit attorneys do not receive fees for unsuccessful appeals and unsuccessful objections. For that reason, the fee petition from the Alexander Objectors must be rejected.

(JA 8993-94).

The Court's decision is flawed in two, independent ways. First, although the Court undertook to award common benefits fees solely for **securing** the Settlement in this case, the Court refused Lubel's request for common benefit fees on the basis of post Settlement Agreement objections. This Court will, as a part of this appeal, determine whether the District Court's characterizations of the Alexander Objectors challenges to the fee process and Co-Lead Class Counsel's fee petition are meritorious. But, the District Court should have analyzed Lubel's contributions to

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oversight and maintenance services through May, 31, 2019; and is now the sole Class Counsel for all further implementation services, Co-Lead Class Counsel will achieve an overall percent of the distributed settlement funds that is exponentially higher than the original 11% suggested by the District Court. (JA 9383-9401, 9428-9444)

the Settlement Agreement using the same formula as other counsel; that is, what contributions did Lubel make to the settlement.

Second, Lubel's contributions to the Settlement Agreement ultimately approved by the District Court are established by declaration and not refuted by any counter-declaration; yet, the District Court did not address these contributions at all. Instead, the District Court focused on a review of Lubel's pleadings, none of which pertain to the settlement negotiations.

The District Court's implicit reasoning for the refusal to allocate is clear and contrary to law: Objectors are not entitled to common benefit fee. Co-Lead Class Counsel led the Court to this conclusion, suggesting from the outset that opposition to the Settlement Agreement was common-benefit disqualifying and that Lubel's "relentless opposition" to the settlement was a critical component to the zero allocation recommendation. (JA 8263). Confirming this reasoning, the Court analyzed, for example, the Corboy Objectors as worthy of award because they ultimately assisted Co-Lead Class Counsel in defending the settlement. (JA107). The only exception the Court made from the model was an award to the Faneca Objectors for its counsel's appointment as liaison. (JA 106).

A court may not refuse to compensate contributions to the common benefit of class members solely because those contributions emanate from an objector to the Settlement Agreement. *See e.g. In re Prudential Ins. Co. of Am. Sales Practices*

Litig., 273 F.Supp.2d 563, 565 (D.N.J.), *aff'd sub nom. In re Prudential Ins. Co. of Am. Sales Practice Litig.,* 103 Fed. Appx. 695 (3d Cir. 2004) (internal quotation marks and citation omitted) (holding that "objectors are entitled to compensation for attorneys' fees and expenses if the settlement was improved as a result of their efforts").

Lance Lubel made just such a contribution. Specifically, the language of the Settlement Agreement was revised to meet a concern raised by Lance Lubel. As Lubel's declaration (JA 8189) established:

Lubel pointed out the following vulnerability in the language of the Settlement Agreement:	Class Counsel revised the Settlement Agreement to address Lubel's "plain language concerns":
The Level 1.5 and 2.0 qualifying diagnosis would never appear on any medical record of a former NFL Player because it does not appear in any medical textbook or medical school curriculum – these diagnoses are creatures of and defined by the Settlement alone. Therefore, because a former NFL Player could only qualify for compensation by submitting a diagnosis "*in accordance with the testing protocol annexed in Exhibit 2"* or "*diagnosis outside the BAP consistent with the diagnostic criteria for level 1.5,*" the plain language of the	First, it was broadened to include "evaluation and evidence generally consistent with the diagnostic criteria." Second, the revised Settlement included 6.4(b): "For the avoidance of any doubt, the review of whether a Qualifying Diagnosis is based on principles *generally consistent with* the diagnostic criteria set forth in Exhibit 1 (Injury Definitions) does not require identical diagnostic criteria, including without limitation, the same testing protocols or documentation requirements."

Settlement criteria was virtually self-defeating.	

Refining and tightening definitions of key terms in the settlement is, according to Co-Lead Class Counsel, one of the important steps taken by Plaintiffs after the Court rejected the initial version of the Settlement Agreement. (JA 6654) (averring that the work on key terms was among the changes that "were the result of significant analysis, coordination, and research." Co-Lead Class Counsel did not refute these facts. Lubel's singular role as the impetus to refining the Level 1.5 and Level 2.0 diagnostic criteria is unchallenged. Without Lubel's contribution, 94% of the class members' eligibility to participate in this settlement would have been in jeopardy because the original Settlement Agreement defined those claims out of existence. NFL's efforts to contest these Level 1.5 and Level 2.0 diagnoses, even as "generally consistent with" show the strategy to avoid the vast majority of the settled claims. (*See, e.g.* JA 9385) (noting the NFL's challenges to "generally consistent with" success of diagnostic criteria).

Lubel submitted a timely declaration seeking a portion of the common benefit fee allocation. Lubel opined that his firm's common benefit fee to date, calculated on a $450/hour rate, would be at least $450,000 plus expense reimbursements of $10,936.19 mostly consisting of meetings to NYC, Miami and Chicago at the request or suggestion of Class Counsel. This Court should reverse the District Court's

allocation order because it arises from a process lacking fairness, transparency and adequate judicial supervision.

CONCLUSION

The Court should remand all fee issues to the District Court with instructions to: (a) implement a proper procedure akin to *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 342 (3d Cir. 1998), staging over time to reasonably value to settlement before a percentage recovery and to conservatively manage the Fee Fund;

(b) to eliminate a 5% holdback;

(c) eliminate a presumptive IRPA cap to assure class members will have both the aligned advocate and funding partner to make success claims; and

(d) reassess allocation of common benefit fees in accord with *In re Diet Drugs*, 582 F.3d at 524, including due consideration to the contributions of objectors.

The Aldridge Objectors respectfully suggest that the procedure should incorporate all of the resources of the appointed professionals. Special Master Perry Golkin should, assuming Class Counsel's compliance with Case Management Order No. 5, already should have quarterly data from 2012 and could confirm or refute Class Counsel's submission of compensable time and expense only. Court Expert

Professor William B. Rubenstein's tasks caused him to review voluminous materials to opine on related fee matters. And, Magistrate Judge Strawbridge is resolving attorney lien matters and could field any complaints or concerns about a specific IRPA fee.

Dated this 12th Day of August, 2019.

Respectfully submitted,

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COMBINED CERTIFICATIONS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because, excluding the parts of the document excluded by Fed. R. App. 32(f), this document contains 12,707 words. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font, except for footnotes which are in 12-point font.

In accordance with 3d Cir. L.A.R. 31.3(c), I certify that the text of this electronic brief is identical to the text in the paper copies. A virus detection program was run on the electronic brief and no virus was detected.

In accordance with 3d Cir. L.A.R. 28.3(d), I certify that at least one of the attorneys whose names appear on this brief is a member of the Third Circuit bar or has filed an application for admission to the Third Circuit.

In accordance with Fed. R. App. P. 25(d) and 3d Cir. L.A.R. 113.4(c), I certify that on August 12, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Charles L. Becker

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